(3)

Supreme Court, U.S.
FILED
APR 9 - 2004
OFFICE OF THE CLERK

No. 03-1137

IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO,
in her individual and official capacity,

Petitioner,

v.

MARIO DIBLASIO, M.D. and MARIO DIBLASIO, M.D., P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General
MICHAEL S. BELOHLAVEK
Deputy Solicitor General
JAMES M. HERSHLER
Assistant Attorney General

ELIOT SPITZER
Attorney General
of the State of New York
120 Broadway
New York, NY 10271
(212) 416-8020

Attorneys for Petitioner

* *Counsel of Record*

186863

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

ARGUMENT

NEW YORK'S PROCEDURE GOVERNING SUMMARY SUSPENSION OF PHYSICIANS IS SIMILAR TO PROCEDURES WHICH HAVE BEEN HELD BY THE SIXTH, EIGHTH, AND TENTH CIRCUITS TO WARRANT ABSOLUTE IMMUNITY

Unlike the Second Circuit, the Sixth, Eighth and Tenth Circuits, respectively, have found the statutory protections governing summary suspensions in Tennessee, Arkansas, and Colorado sufficiently protective of physicians' rights to warrant extension of absolute immunity to non-judicial decision-makers. See *Watts v. Burkhart*, 978 F.2d 269 (6th Cir. 1992); *Dunham v. Wadley*, 195 F.3d 1007 (8th Cir. 1999), *cert. denied*, 531 U.S. 819 (2000); *Horwitz v. State Board of Medical Examiners of the State of Colorado*, 822 F.2d 1508 (10th Cir.), *cert. denied*, 484 U.S. 964 (1987).

Contrary to respondent's contentions, *see* Respondent's Brief in Opposition ("Br. in Opp.") at 17-29, there is no material difference between New York's summary suspension statute, Public Health Law ("PHL") § 230(12), and the equivalent statutes of Tennessee, Arkansas, and Colorado. New York affords functionally identical, if not greater, protections to physicians than do these other three states. As detailed below, these protections include the opportunity to be interviewed with counsel present prior to any suspension; the requirement that the decision-maker in a summary suspension action (in New York, the Commissioner) find probable cause for a suspension at the behest of other medical experts and find that a physician's actions constitute an imminent danger to the public health; and the correctability of a suspension. The Second

Circuit's decision thus conflicts with the decisions of its sister circuits, meriting a grant of certiorari by this Court.[1]

A. Pre-Suspension Interviews

PHL § 230(10)(a)(iii) requires that the Board must conduct a pre-suspension interview with the physician, at which the physician may have counsel present and may submit written comments or expert opinion. At this interview, the physician under investigation has the opportunity to provide an explanation of the issues under investigation. By comparison, the summary procedures at issue in Tennessee, Arkansas, and Colorado do not provide this significant safeguard. *See* Tenn. Code Ann. § 4-5-320(d)(1)(B); Ark. Code Ann. §§ 17-101-203, 25-15-211; Colo. R. Stat. § 24-4-104(4).

B. The Commissioner Does Not Have "Unfettered Discretion" to Issue A Summary Suspension

Contrary to respondent's contentions, *see* Br. in Opp. at 5-6, PHL § 230(12)(a) does not afford the Commissioner "unfettered discretion" in determining whether a summary suspension is warranted. Rather, as the Second Circuit recognized, the Commissioner has authority to summarily suspend a physician's license only after "an investigation and a recommendation by a committee on professional conduct," which must include two physicians. Pet. App. at 18a; *see also* PHL §§ 203, 230(6). Before an investigative committee may even recommend a suspension to the commissioner, it

---

1. While respondent focuses on alleged errors by the Commissioner, any such conduct is irrelevant here. "If judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error.'" *Mireles v. Waco*, 502 U.S. 9, 12-13 (1991) (quoting *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)).

must consult with a medical expert. *See* PHL § 230(10)(a)(ii). These requirements are functionally equivalent to the procedures required by Tennessee and Colorado, where summary action may be taken by a panel comprised largely of physicians. *See Watts*, 978 F.2d at 275; *Horwitz*, 822 F.2d at 1511; *see also Dunham*, 195 F.3d at 1010 (veterinary medical examining board comprised of four veterinarians and one citizen).[2]

In requiring a predicate determination that the physician's practices are an "imminent danger" to the public, New York's law further cabins the Commissioner's discretion in a manner that mirrors the standards applied by Tennessee, Arkansas, and Colorado. *See Watts*, 978 F.2d at 276 (Tennessee law authorizes suspension prior to notice and hearing where board finds "that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order"); *Horwitz*, 822 F.2d at 1512 (Colorado law authorizes summary suspension without prior notice or a hearing, "when the Board has reasonable grounds to believe that the public health, safety, or welfare is endangered and the board finds that emergency action is required"); *see also* Ark. Code Ann. § 25-15-211(c) (summary suspension authorized "[i]f the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order").[3]

---

2. New York's procedures also insure that probable cause is established before the Commissioner takes summary action. *See Barry v. Barchi*, 443 U.S. 55, 65 (1979). ("At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements.")

3. Respondent's related assertion that New York's statute provides "no procedural safeguards" because it does not require "an evidentiary finding," Br. in Opp. at 19, is misplaced. There is no such requirement in the context of interim action such as a summary suspension. (Cont'd)

C. Correctability On Appeal

Respondent's assertion that only the Commissioner could modify or vacate her own summary suspension order, see Br. in Opp. at 28, is erroneous. Any errors in respondent's summary suspension were immediately and adequately correctable on appeal. Respondent fails to acknowledge that, from the outset, he could have challenged his summary suspension in a state court proceeding on the grounds that the Commissioner's order was "in violation of lawful procedure," "affected by error of law," "arbitrary and capricious," or "an abuse of discretion." CPLR § 7803. Respondent also was entitled to raise state court claims that his adjudicator "was biased and prejudiced the outcome" or engaged in improper ex parte communications. *Locurto v. Safir*, 264 F.3d 154, 174-75 (2d Cir. 2001). In addition, respondent was entitled to an expedited disciplinary hearing commencing within ten days of his summary suspension, *see* PHL § 230(12)(a), but he fails to acknowledge that he agreed to adjourn his hearing and continue his suspension until the conclusion of his disciplinary hearing.

Respondent also declines to mention that he eventually brought a state court proceeding alleging that the health commissioner was biased and that his suspension was unfounded. The state court, after granting respondent temporary partial relief, ultimately upheld the commissioner's determination to continue the full suspension, finding that it "did not appear to be arbitrary and capricious but rather was based upon the totality of the facts before her." Pet. App. at 33a. The very next day the hearing committee dismissed the charges

---

(Cont'd)

See Maryland v. Pringle, 124 S.Ct. 795, 800 (2003) ("finely tuned" evidentiary standards "have no place" in the probable cause decision (quotation omitted)).

and terminated the suspension. *Id.* Consequently, respondent clearly had procedural redress to "correct" his "erroneous" suspension, and in fact utilized those procedures.

While the Second Circuit discounted the value of immediate judicial review of the interim suspension and a prompt post-suspension hearing, *see id.* at 14a, the Tenth Circuit found similar provisions in Tennessee's statutory framework to be sufficient for purposes of mitigating "[a]ny danger of improper use of the board's summary powers." *Watts*, 978 F.2d at 276.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

Of Counsel:

CAITLIN J. HALLIGAN*
Solicitor General
MICHAEL S. BELOHLAVEK
Deputy Solicitor General
JAMES M. HERSHLER
Assistant Attorney General

ELIOT SPITZER
Attorney General
of the State of New York
120 Broadway
New York, NY 10271
(212) 416-8020

Attorneys for Petitioner

* *Counsel of Record*